No. 2876

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE NORMA MINING COMPANY
(a corporation),

Appellant,

vs.

HUGH MACKAY,

Appellee.

PETITION FOR REHEARING ON BEHALF OF APPELLANT.

ALFRED SUTRO,
Standard Oil Building, San Francisco,
Attorney for Appellant and Petitioner.

Filed this.....day of June, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

No. 2876

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE NORMA MINING COMPANY
(a corporation),
Appellant,

vs.

HUGH MACKAY,
Appellee.

PETITION FOR REHEARING ON BEHALF OF APPELLANT.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant respectfully asks that the decision of this Honorable Court, made in this cause, on the 7th day of May, 1917, be set aside and a rehearing granted.

It asks this because, under the decree in this case, which has been affirmed, the appellee has foreclosed two mortgages which do not belong to him. It can, we confidently believe, be shown, if a rehearing is granted, that the mortgages, involved in this suit, were not the property of the appellee, but were received by him, in trust, under an agreement in writing with one R. T. Root, to negotiate or sell them, for the ben-

efit of himself and of Root, and, if he could not sell them, then to return them to Root. This agreement between Root and the appellee was, in effect, an agreement between the appellant and the appellee; for, this Court has decided that Root "was in effect the corporation" (i. e., the appellant). If there was such an agreement between the appellee and Root, then, of course, he had no right to foreclose the mortgages in question as his own, and, in that event, the affirmance of the decree of foreclosure works a grave injustice to the appellant.

As defenses to this suit the appellant urged, first, that it never authorized the execution of the mortgages; second, that there was no consideration therefor moving to it; and third, that the mortgages were delivered to the appellee solely for the purpose of negotiating their sale, and not as evidencing any obligation to the appellee, which the latter had the right to enforce against appellant.

This Court holds that, irespective of the evidence upon the question of actual authorization of the mortgages by the appellant, inasmuch as Root was the owner of all of the shares of the capital stock of the appellant, and "was in effect the corporation", his execution of the mortgages, as president of the appellant, bound the appellant, because, the Court says:

> "a court may properly look beyond the corporate form and hold that what would be binding upon the persons composing the corporation would be binding upon the corporation. Linn Timber Co. v. United States, 236 U. S. 574; Linn & Lane Tim-

ber Co. v. United States, 196 Fed. 593, and cases there cited."

Upon this application, we respectfully urge that, inasmuch as this Court has decided that "Root was in effect the corporation" and that "what would be binding upon the persons composing the corporation would be binding upon the corporation", it should, in justice to the parties, also hold that the agreement made by Root with the appellee, that the mortgages should be either sold by the appellee, or otherwise be returned to Root, constituted a part of the contract between the appellant and the appellee. Certainly if, as this Court holds, Root had the power, as sole stockholder, to bind the appellant by his execution of the mortgages, he also had the power, on behalf of the appellant, to contract with the appellee that the mortgages should either be sold by the appellee or be returned to him.

While this Court, in its opinion, states that one of the defenses, urged by the appellant, was that the mortgages "were conditionally delivered to the appellee", it has not discussed this important point, for the reason, no doubt, that the main point relied upon for a reversal was that the mortgages were not authorized by the appellant.

The record in this case shows, as this Court points out, that the appellee, as executor of the estate of one George Miller, deceased, had loaned to Root $10,000. belonging to the estate of his decedent; that the appellee was most anxious that these moneys should be repaid to him, and that Root was most anxious to

repay them; that Root was financially embarrassed and could not repay the appellee; that he and the appellee then hit upon the scheme that the appellant should execute the mortgages in question, and that the appellee should take them, not as his own, but for the purpose of selling them; that out of the proceeds of the sale he was to repay to himself the Miller estate moneys loaned to Root and that the balance was to be paid to Root; and that, if he could not sell the mortgages, he was to return them to Root.

When the $16,000. note and mortgage were delivered to the appellee, on August 2, 1913, he gave Root a receipt, in which he recited that he received the note and mortgage for the purpose of selling them, and, if sold, to pay from the proceeds the $10,000. loaned by him to Root, and the balance to Root; that Root himself was negotiating for a loan upon the mortgaged property; that, if he made a loan, he was to make a mortgage on the property and to notify the appellee, and if the appellee had not sold the note and mortgage, or if he failed to sell them within one month from the date of the receipt, he was to return them to Root, and that the mortgage was not to be recorded unless sold by the appellee (Tr. pp. 192, 193).

According to this receipt, we submit, there can be no question that there was only a *conditional* delivery of the note and mortgage to the appellee, for the sole purpose of their sale or of their return to Root. For the convenient reference of the Court we here insert the receipt:

"Hotel Alexander.

Los Angeles, Aug. 2d, 1913.

Received from R. T. Root a note for $16,000.00 of this date due to my order in 4 months, and a mortgage on 46 patented mining claims in White Hills, Mohave Co., Arizona, executed to me to secure said note, and both the note and the mortgage are executed by the Norma Mining Co. (an Arizona corporation), and said Root informs me that the said 46 mining claims stand in the name of said company on the records of said County.

I have recvd this mortgage and note for the purpose of selling them, and if sold pay from the proceeds recvd from their checks aggregating about $10,000.00 held by me as executor of the George Miller Estate, which said checks are signed by said Root, and after paying said checks the net balance recvd for said note and mortgage is to be turned over to said Root by me. Said Root says he is now negotiating for a loan upon said property. If he makes a loan he is to make a mortgage on said property and notify said Mackay *and if Mackay has not sold said note and mortgage first referred to herein, he is to return same to me,* or *if said Mackay fails to sell said note and mortgage within one month from date he is to return them to me and the said mortgage first herein referred to is not to be recorded unless sold by said Mackay or his assistants.* Said note and Mortgage was first made for $20,000.00 but afterwards & before I received them they were changed to $16,000.00 in lieu thereof.

Hugh Mackay."

The appellee could, of course, not deny the effect of this writing. He testified, "This mortgage was delivered to me on August 2d to sell" (Tr. p. 87). "I gave a receipt to return it. Yes, I signed Defendant's Exhibit No. 1" (Tr. pp. 28, 29). He sought to overcome the effect of the writing by testifying, however, that

> "Now, if you want to know the arrangement that was made, I will tell it. I took this $16,000. mortgage as my own as credit" (Tr. p. 55).
>
> "It was delivered to me as my own on the 25th or 26th of August" (Tr. p. 87).

He further claimed that he took the note and mortgage to secure the loans, which, as executor, he had made to Root out of his trust funds. Yet, the record shows that he did not record the mortgages until more than a year later, August 29, 1914 (Tr. pp. 170, 177). Here then was an executor who had loaned $10,000. of the moneys of the estate of his decedent, for the return of which he was most anxious and worried; he claims to have taken a certain note and mortgage in satisfaction of the loan, and yet he keeps the mortgage in his possession, unrecorded, for more than a year after it was executed. But, there is in the record a significant letter from the appellee to Root, dated August 27, 1914, wherein he explains why he recorded the mortgages. In that letter he says:

> "The Heirs are raising Cain and I held the mortgages without being recorded to the last minute, but *had to give them up* and they are recorded.";

also:

> "But if this mortgages are not taken up there will be the worst trouble here for me you ever saw, and these heirs will bring you here to face the music too.";

further:

> "Surely you can get some one to carry the paper temporarily with all that property clear excepting taxes.";

further:

> "It will save me and yourself if you get a buyer there at once to carry it temporarily. If you cannot it will ruin me and likely yourself as these heirs are wild over their money.";

and, finally, in the postscript to the letter:

> "Let me know in some way at once if you can do anything as I am terribly worried and have reason to" (Tr. pp. 218, 219).

This letter stands unexplained. There can, we submit, be no explanation to it consistent with the testimony that the note and mortgage were delivered to the appellee as his own on the 25th or 26th of August of the preceding year.

If they were his own, why did he write to Root excusing himself for recording them?

If they were his own, why did he write to Root that he held them to the last minute, but had to give them up for recordation?

If they were his own, why did he write to Root, still urging him to get some one to carry the paper or to buy the paper?

If they were his own and had been taken in satisfaction of Root's debt to him, why did he write to Root that, unless they were sold and the money raised, he and Root would both be ruined and that he was terribly worried?

The truth is, they were not his own and had not been delivered to him in satisfaction of Root's debt to him; they were delivered to him in trust to sell, or to

return, and not to foreclose for his own benefit and advantage.

But, there is further written evidence, signed by the appellee, of the falsity of the statement, that the note and mortgage were delivered to him as his own on August 25th or 26th, 1913.

On February 12, 1914, he wrote to Root:

> "The 16000 note is over due and cannot be handled unless the taxes are paid or enough reserved out of the amount to pay them, etc.";

On February 13, 1914, he wrote to Root:

> "I wrote you yesterday, and hope I made it plain that there is no use of your expecting me to sell the 16000.00 note with 3000. taxes against the property, no abstract, etc.";

further:

> "My impression is that if you expect the money to pay the estate from that source, you better have a new mortgage properly made for enough to pay the estate and taxes and any expense in selling the mortgage." (Tr. p. 210);

further:

> "Anyhow the acknowledgment must be corrected on the mortgage before you could handle excepting with a person whom you would know and went by what you would tell him.";

further:

> "I said on your return you would come up *with me* to the Court House and explain these loans. I had to admit that the loans were made temporarily on demand, that I believed they would be meet as stated, but had to take these securities when the time came. You can corroborate all I said.";

further:

> "However, the money must be paid without delay. Get it some way even if you have to make a sacrifice, if you think the show is good to get it there I will come at once, although in all fairness you should send me expense money.";

and then there appears this in the record:

> "(Notation on side of letter.)
>
> It is important that you advise me promptly of what you can do, unless settlement can be made this 16000 Mort. must be recorded, that I cannot prevent" (Tr. pp. 211, 212).

Why, if he owned the mortgage, did he write to Root that the $16,000. note is overdue and cannot be handled unless the taxes are paid, or enough reserved out of the amount to pay them?

Why, if the mortgage was delivered to the appellee as his own, and not for the purpose of selling, did he write to Root that he hoped he had made it plain that there was no use of Root's expecting him to sell the $16,000. note with $3000. taxes against the property, no abstract, etc.?

Why, if he owned the mortgage, did he write to Root that if Root expected the money to pay the estate from that source he better have a new mortgage properly made for enough to pay the estate and taxes and any expense in selling the mortgage?

Why, if he owned the mortgage, did he not insist on a proper and corrected acknowledgment, instead of writing to Root that anyhow the acknowledgment must be corrected on the mortgage before it could be handled?

Why, if he owned the mortgage, did he write to Root that he had said to the Court that Root, on his return, would go with him to the Court House and explain these loans; that he had to admit that the loans were made temporarily on demand; that he believed they would be met as stated, but that he had to take these securities when the time came, and THEN SUGGEST TO ROOT THAT ROOT CAN CORROBORATE ALL HE SAID?

Finally, is it consistent with the appellee's claim of ownership of the note and mortgage, for him to write to Root that, unless settlement can be made, the $16,000. mortgage must be recorded, that he could not prevent recording it?

The testimony of Root concerning the conditional delivery to the appellee of the mortgage, for the purpose of selling it, is clear and positive. He testified:

> "This mortgage, $16,000. mortgage, was delivered conditionally to Mr. MacKay to be sold by Mr. MacKay, and a purchaser to be procured" (Tr. p. 40).
>
> "The first mortgage was never sold. It was conditionally delivered to Mr. MacKay and never returned to me."
>
> "I did not demand the return of the first mortgage as he was still making an effort to sell it, and that continued right along. The first mortgage was long overdue. Mr. MacKay was endeavoring to sell it as his time for selling the mortgage had been extended" (Tr. p. 41).
>
> "There was an extension asked for or granted to Mr. Mackay of the time within which he could sell this mortgage."

> "The mortgage was never given to him as security but was given to him for selling only. At various times Mr. Mackay applied to me for leave to have the mortgage recorded. I always told him not to record it" (Tr. p. 42).

In reply to this application, the appellee may urge that strong evidence, that he had taken the notes and mortgages in question in satisfaction of the indebtedness of Root to himself, is furnished by the fact that Root produced and introduced in evidence his canceled checks, which he had given the appellee for the moneys of the Miller estate, loaned to him by the appellee; but, the record shows, by the testimony of the appellee himself, that, for those checks, Root gave *his own five promissory notes to the appellee*—NOT THE NOTES OF THE APPELLANT INVOLVED IN THIS ACTION; that the appellee had Root's notes in his possession; that on his cross-examination they were produced and introduced in evidence and their dates explained. These notes were defendant's Exhibits Numbers 9, 10, 11, 12, 13 and 14 (Tr. pp. 71, 72, 197-199, 200), and aggregated in amount $10,160. The amount of Root's checks held by the appellee and which he surrendered to Root was $10,036.18, Exhibits 3, 4, 5, 6, 7, 8 and 17 (Tr. pp. 194-197, 203).

We have, on this application, sought to point out to the Court some of the evidence in the record in this case, which demonstrates, we submit, the truth of our statement that the appellee has, by this action, attempted to foreclose two mortgages which do not belong to him, and that he has imposed upon this Court and the trial Court. There is more evidence of a similar

character in the record. We believe we have, however, cited sufficient to raise such a doubt in the mind of the Court, concerning the justice and correctness of the decree in this case, as to entitle the appellant to a rehearing.

Dated, San Francisco,
June 25, 1917.

Respectfully submitted,

ALFRED SUTRO,
Attorney for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

ALFRED SUTRO,
Counsel for Appellant and Petitioner.